Thai and her son *viz.* Fong Choon Weng being interested parties, about the bottles lying in the big plastic bag not being dusted for finger prints; and about Fong being charged with possession of drug.

The learned Deputy submitted that all the exhibits were recovered in the room, and the accused had signed the search list. Personal belongings of the accused, including his wallet and identity card (or rather the substitute of identity card in the shape of a printed form pending issue of replacement identity card) were found. The room was rented to the accused. The room has a lock. All the keys were given to the accused. Fong was never questioned by the accused as to his friends being brought to the accused's room neither was Fong questioned by the accused about Fong's drug case.

After considering the defence evidence, it has not cast a reasonable doubt on the prosecution case. In particular, I found it hard to believe that the accused had not noticed the presence of the big plastic bag which contained the incriminating exhibits in a small room bare of all furniture except the mattress and piilow etc. He was then in the room for about 10 hours. No personal belongings of Fong were found in accused's room though the accused hinted very broadly but never at any time said directly that the drug belonged to Fong who himself was supposed to have been involved in a drug case. Why did the accused fail to confront Fong with a suggestion that the drug belonged to Fong? Could it be that his conscience had prevented him from doing so when he knew that it belonged to himself? I was inclined to believe so, without hesitation. I did not doubt that when the police knocked on the door of his room, his room was in fact locked. There could not have existed any familiarity among the flat dwellers there of such a kind as for the accused to leave his room unlocked when he slept. I had however some doubt about the bunch of keys not listed in the search list.

I could not accept Insp. Mudasir's explanation that the failure to mention the bunch of keys in the search list was due to the said bunch of keys not having been recovered from the person of the accused as distinct from the room of the accused. On the point of prosecution case that the bunch of keys was recovered from the key-hole of the accused's room, the defence, in my view had cast a reasonable doubt on it. I would even go even so far as to say that the bunch of keys could have been recovered from the top of T.V. set outside in the hall.

Notwithstanding the above, I addressed myself the question as to whether the above finding, viewed objectively, could have the effect of raising a reasonable doubt on the vital prosecution case of possession of the drug in question. I considered the use of latches in regard to the door of the bathroom, in relation to the main door to the accused's room, so that one could use the latch to lock a door instead of using and turning the key in the key-hole to lock it. I considered the evidence of Insp. Mudasir and the accompanying two other members of the police party, about Insp. Mudasir knocking the door of the locked room, about the accused opening it; and above all, the incriminating exhibits were all admittedly found in his room. The smallness of the room, the absence of all furniture except the mattress and pillow, the length of time during which the accused was in the room, *i.e.* the accused's return to the room at 1.00 a.m. that early morning and the arrest at about 10.00 a.m. later, all made it quite impossible for the accused not to have noticed the exhibits, short of the evidence of a black-out or power failure at the material times. At the end of the day, the defence had still not raised such a reasonable doubt as to be entitled to it to result in an acquittal.

I therefore found the accused guilty as charged and convicted him, sentencing him to death by hanging as prescribed.

Accused convicted and sentenced accordingly.

Solicitors: *K.C. Lai & Co.*

AHMAD BIN OMAR v. HAJI SALLEH BIN SHEIK OSMAN

[O.C.J. (Mohamed Dzaiddin J.) September 9, 1985, May 7, 8 & July 31, 1986]

[Penang – Civil Suit No. 488 of 1979]

Land Law – Agreement for redemption of property – Jual janji – Specific Performance – Equitable intervention – Whether time of the essence of the contract.

Equity – Jual janji transaction – Specific performance – Equitable intervention – Whether time of the essence of the contract.

In this case the plaintiff had agreed to sell a piece of land to the defendant for the consideration of $12,000. It was agreed that the purchase price was to be paid at the date of the execution of the agreement and the plaintiff agreed to execute the transfer of the land in favour of the

defendant. The plaintiff also agreed to repurchase the land within three years of the date of the agreement by paying the defendant the sum of $12,000. In the event the redemption money was not paid within three years the plaintiff agreed to surrender the land to the defendant. The defendant was to take possession and to have quiet possession of the land without any interference during the period of three years.

The plaintiff claimed that the transaction was a *jual janji* transaction and under the terms of the agreement the defendant was obliged to execute a retransfer of the land to him upon repayment of $12,000. This was denied by the defendant. The plaintiff said he attempted to repay the loan within the period of three years but the defendant had been avoiding the plaintiff.

Held: (1) this was a *jual janji* transaction and the court could give effect to the equitable rights existing between the parties;

(2) even if time was originally of the essence of the contract it had been allowed to pass and the conduct of the parties showed that it was no longer so;

(3) the said property should be reconveyed to the plaintiff within three months upon payment by the plaintiff to the defendant of the sum of $12,000.

Cases referred to:

(1) *Haji Abdul Rahman* v. *Mahomed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.
(2) *Mahadevan & Anor.* v. *Manilal & Sons (M) Sdn. Bhd.* [1984] 1 M.L.J. 266.
(3) *Ismail bin Haji Embong* v. *Lau Kong Han* [1970] 2 M.L.J. 213.

CIVIL SUIT.

V. Muthusamy for the plaintiff.
Natha Singh for the defendant.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: The plaintiff's claim is for specific performance of an agreement made between him and the defendant on October 18, 1976 for a redemption of property known as Lots 356 and 357, Mukim 13, Seberang Perai Utara ("the said land") and for damages and costs.

By an agreement (prepared in Bahasa Malaysia) dated October 18, 1976 (P1) the plaintiff as vendor agreed to sell to the defendant as purchaser the said land for the consideration of $12,000 upon the following terms and conditions:—

1) that the purchase price of $12,000 was paid by the defendant at the date of the execution of this agreement, the receipt thereof the plaintiff had acknowledged;
2) that the plaintiff agreed to execute the transfer of the said land in favour of the defendant;
3) the plaintiff agreed to repurchase the said land within 3 years from the date of this agreement by paying the defendant a sum of $12,000.;
4) in the event the redemption sum was not paid within 3 years, the plaintiff agreed to surrender the said land to the defendant without further action;
5) lastly, the defendant was to take possession and to have quiet occupation of the said land without any interference during the period of 3 years.

The plaintiff claims that this is a *Jual Janji* transaction and under the terms of the agreement the defendant is obliged to execute a retransfer of the said land to him upon repayment of $12,000. This is denied by the defendant in his defence where he alleged that he knew nothing about the *Jual Janji* transaction and that P1 was never explained to him. Alternatively, as time is the essence of the agreement, the exercise of the option to repurchase by the plaintiff was not made within time.

Therefore, the central issue in this case is whether the agreement dated October 18, 1976 is a *Jual Janji* transaction. If so, is the plaintiff entitled to specific performance of the said agreement, notwithstanding a provision that the repurchase must be made within three years from date of the agreement?

According to the plaintiff, in October 1976 he needed money to help his son, a police inspector. He approached a friend, Hj. Mohamed bin Taib (P.W.2), a retired court clerk, for help, who upon payment of a small fee, managed to get the defendant to help. A loan for $12,000 was then arranged. On October 13, 1976 he received from the defendant a cheque of $6,000 as the first payment and the balance thereof was agreed to be settled by the defendant on the date of the execution of the transfer of the said land. He executed a letter of acknowledgment of receipt (P6). On October 18, 1976 he executed a transfer in Form 14A before the Collector at the Land Office Butterworth (AB1). On the same day he signed the agreement, P1, which was prepared by P.W.2. The plaintiff denied that he received the balance sum of $6,000 at the time and date mentioned in P6. He stated that from time to time, he received some smaller sums making a total of $10,000. The balance of $2,000 was deducted by the defendant as his expenses.

The plaintiff further testified that he informed

the Collector in his office that the transfer was subject to a *Jual Janji* agreement and that it was to be reconveyed within 3 years. He did not produce the agreement P1 to the Collector at that time because it was still in a draft form. P1 was prepared by P.W.2 and typed by a petition writer. It was subsequently signed by him at the defendant's house on the same day.

According to the plaintiff, he tried to repay the loan of $12,000 within the period of 3 years. On October 10, 1979 he went to the defendant's house with P.W.2 to repay the loan. He brought a cheque with him but the defendant refused to execute the retransfer and asked for time. The plaintiff visited the defendant on six occasions. On October 12, 1979, on his instruction his lawyer sent a notice by A.R. register (P5) to the defendant asking him to call at the lawyer's office on or before October 17, 1979 to execute the retransfer of the said land (P4). The said letter was unclaimed by the defendant. On October 15, 1979, he visited the defendant and brought a cheque for $6,000 (P7). Again, sometime in November 1979 the plaintiff sent another letter which the defendant received on November 7, 1979 (P8). On November 6, 1979, the plaintiff's solicitors gave final notice of intention to commence proceedings (AB9). His solicitor then replied to the plaintiff's solicitors reiterating that the sale of the said land was an outright sale without any conditions attached. Subsequently, the plaintiff caveated the said land.

The defendant, a religious teacher and a J.P., testified that he received a letter (D10) from P.W.2 where it was indicated that the plaintiff was interested to sell his land to help his son. The parties then agreed to enter into a contract. On October 13, 1976, he gave the plaintiff $6,000 as his first instalment and the balance was to be paid on October 18, 1976 when the plaintiff executed the transfer. The plaintiff signed a letter of acknowledgment (P6). He stated that he paid the balance of $6,000 in one lump sum at the Land Office, Butterworth in the presence of the Collector and P.W.2. As far as he was aware there was no question of *Jual Janji* even after the transfer was executed.

When shown the agreement P1, the defendant stated that he had not seen this document before. According to him, the plaintiff gave P1 for his signature because the latter required it for income tax purposes. Under cross-examination, he agreed that as a Justice of Peace, many people had seen him for advice and for attestation of documents. Sometimes, he explained the contents of these documents. He admitted that he had in the past entered into purchase agreements when he bought and sold properties. He would normally read these agreements first before signing them. However he denied reading P1 before signing it. He trusted the plaintiff. He also denied having seen P1 at his house after the execution of the transfer document, Form 14A, at the Land Office, Butterworth. Lastly he denied that he knew about the content of P1 which stated that the said land would be retransferred within 3 years after full payment of the purchase price.

The only witness in this case was Hj. Mohamed bin Taib, P.W.2, who is known to both parties. He was a retired court clerk and was responsible for helping the plaintiff to get the loan from the defendant. He drafted P1 which was finalised by a petition writer. He also prepared the acknowledgment letter, P6, on behalf of the defendant. He confirmed that the plaintiff received cash for $6,000 but could not remember where it was paid. According to him it could have been paid in his house. He confirmed that the balance of $6,000 was paid by the defendant to the plaintiff at the Land Office, Butterworth. However, he stated that he did not see the plaintiff receiving the money but only assumed that the payment was made since the transfer was executed in the presence of the Collector.

With regard to P1, he stated that he was only a witness to the signatures of both parties. P1 was brought to him by the plaintiff after it was signed by the parties. He did not explain the content of P1. As far as he could remember, P1 was executed in the Collector's office. P.W.2 further testified that although he did not read the content, he knew that P1 was a *Jual Janji* agreement. He admitted having accompanied the plaintiff to the defendant's house for the purpose of getting the defendant to redeem the said property.

Under cross-examination, P.W.2 admitted having written to the defendant on October 7, 1976 informing him that the plaintiff wanted to sell his land (D10). Then on October 10, 1976 he wrote another letter confirming the purchase price and the mode of transfer. Upon evaluating P.W.2's evidence, he appeared to be siding the defendant although he was the plaintiff's witness. This can be clearly seen when he stated that the defendant paid the plaintiff the balance of $6,000 at the Land Office Butterworth although he did not personally see it. As for P1, he stated that he was

only a witness to the signatures therein, forgetting the fact that he was responsible for preparing the draft. He further stated that he did not explain the content of P1, meaning to the defendant. In view of the documentary evidence, I do not give much credence to P.W.2's evidence. He is neither there nor here.

Based upon the evidence before me, I am satisfied that the said property was transferred by the plaintiff to the defendant as a *Jual Janji* transaction. On the balance of probability, I accept the evidence of the plaintiff and reject the defendant's evidence regarding P1. I find the plaintiff to be a witness of truth. The defendant is a religious teacher and a Justice of Peace. In his evidence he admitted having some experience regarding the sale and transfer of properties. Therefore, it is my conclusion that he cannot be so naive not to know the contents when he executed P1. He must have known the intention of the plaintiff was to get a loan of $12,000 in order to help his son and the execution of a transfer in Form 14A was purely a security for the loan. He cannot just simply deny that he knew nothing about P1 and that its content was never explained to him.

Having found that the agreement is a *Jual Janji* transaction, the next question is whether time is the essence of the contract. This depends on the intention of the parties. Reverting first to the evidence of the plaintiff, it is clear that his first attempt to get the defendant to execute a retransfer was on October 10, 1979 when he visited the defendant's house with P.W.2. He brought along a cheque, but the defendant refused and asked for time. Then on October 12, 1979 the plaintiff's solicitors sent a notice requesting the defendant to call at the office on or before October 17, 1979 to execute the retransfer. However this letter was unclaimed by the defendant. Since then the plaintiff had made several attempts to get the defendant to execute the retransfer on or before October 18, 1979. Finally after the plaintiff's solicitors had sent notice of intention to commence proceedings, the defendant replied through his solicitors stating that the said land was sold without any conditions attached.

In my judgment, the conduct of the defendant does not make time the essence of the contract. There was no evidence before me to show that the plaintiff had been guilty of any undue delay. In fact it was the defendant who had been avoiding the plaintiff to execute a retransfer of the said land and it was only in November 1979 when the three-year period expired that he instructed his lawyer to dispute the plaintiff's claim.

The Law

It should be borne in mind that the authority on the *Jual Janji* transaction is the Privy Council decision in *Haji Abdul Rahman* v. *Mahomed Hassan*[1] where it was held to the effect that a *Jual Janji* transaction could not in law be recognised as a security dealing in land because the collateral agreement for retransfer only had effect in contract and that when the contractual right to retransfer expired, the borrower had no further right to the land. Since this decision, there had been several cases which invoked equitable principles in favour of the strict legal provision. (For a fuller discussion on the subject, see *David Wong's* Tenure and Land Dealings in the Malay States pp. 280-293).

The trend towards equitable intervention was clearly reflected in the recent Federal Court decision in *Mahadevan & Anor.* v. *Manilal & Sons (M) Sdn. Bhd.*[2] This was the case where the respondents alleged that they had advanced to the deceased a total sum of $279,500 and the deceased had repaid the sum of $50,000 leaving a balance of $229,500. The respondent brought the action to recover the balance sum owing. One of the issues raised in the appeal was whether the suit was statute-barred under the Limitation Act 1953. The Federal Court held that the question depended upon the purpose for which the sums were paid and the nature of the rights acquired by the respondents regarding the payments. It also held that there was no provision in the National Land Code prohibiting the creation of equitable charges or liens which are permissible under our Land Code.

In delivering the judgment of the Court, Salleh Abas C.J. (as he then was) stated at p.270 as follows:

"The decision of the Privy Council in *Haji Abdul Rahman* v. *Mahomed Hassan* (*supra*) certainly does not prevent the creation of an equitable charge. In that case an agreement to secure a debt by which the debtor transferred his land to the creditor and upon repayment the land would be transferred back to the debtor was held to be valueless as a transfer or burdening instrument, but was good as a contract. The right so created was not a legal right in the land but only a contractual right. The nature of this contractual right was amplified by Terrell Ag. C. J. in *Arunasalam Chetty* v. *Teah Ah Poh Trading & Anor.* [1973] M.L.J. 17, 21) to be a security for debt outside the provisions of the Land Code.

On the other hand if *Haji Abdul Rahman's* case (*supra*) is considered to have the effect of preventing the creation of an equitable charge, the effect of the decision cannot be extended to other cases. In that case the agreement was held void as a transfer or as a burdening instrument because it contravened section 4 of the (Selangor) Registration of Titles Regulation 1891. This section prohibited the transfer, transmission or the creation of any mortgage or charge, or otherwise dealt with except in accordance with the provision of this Regulation, and 'every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be null and void and of none effect...' And section 41 enacted that 'whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in Schedule E, which must be registered as hereinbefore provided'.

But the subsequent Land Code and the present National Land Code do not contain provisions similar to section 4 of the above quoted Regulation, although the Codes make provisions as to how a charge or a lien can be created. Examination of court's decisions clearly show that the courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien, within the provisions of the National Land Code or the previous Code is executed or created. (see *Ngan Khong* v. *Bamah bt. Pakeh Jamin & Anor.* [1935] F.M.S.L.R. 81); *Arunasalam Chetty* v. *Teah Ah Poh Trading* (*supra*); *Vallipuran Sivaguru* v. *Palaniappa Chetty* ([1937] M.L.J. 59) and *Mercantile Bank* v. *Official Assignee* ([1969] 2 M.L.J. 196). The basis of this ruling is the very raison d'etre of the court's own existence and the imputed intention of the legislature. Terrell Ag. C.J. in *Arunasalam Chetty's* case (*supra*) said:

> '... It is the duty of the Courts to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds ...' (p.22)
>
> '... but it is difficult to believe that it was the deliberate intention of the Kedah legislature by the mere omission to exclude the recognition of the principle of an equitable deposit.' (p.21)

These statements were supported by Whitley Ag. C.J. (S.S.) who sat in the same case and said:

> '... the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes.' (p.18)

Raja Azlan Shah J. (as he then was) reaffirmed this judicial attitude in *Mercantile Bank Ltd.* case (*supra*) when he said:

> '... in the Act, this court is not precluded from giving effect to equitable rights existing between the parties ...' (p.197)."

On the issue whether time is the essence of the contract, I rely on the decision of Ibrahim J. in *Ismail bin Haji Embong* v. *Lau Kong Han*[3] where on the facts, it was held that although time for the exercise of the option to repurchase had expired, time was not of the essence of the contract, as, even if time was originally of the essence of the contract it had been allowed to pass and the conduct of the parties clearly showed that it was no longer so.

Conclusion

For the above reasons I gave judgment to the plaintiff on the following terms:

1) The said property be reconveyed free from any encumbrances to the plaintiff within three months upon payment by the plaintiff to the defendant the sum of $12,000.

2) The Collector of Land Revenue Butterworth do give effect to the transfer as per Order of Court.

3) The defendant do pay the costs to this action to the plaintiff to be taxed by the proper officer of the court.

Judgment for the plaintiff.

Solicitors: *V. Muthusamy & Co.; Natha Singh & Co.*

E.M. BUXTON & ANOR. v. PACKAGING SPECIALISTS SDN. BHD.

[O.C.J. (Siti Norma Yaakob J.) February 21, 1986]

[Kuala Lumpur – Originating Motion No. F51 of 1985]

Conveyancing – Sale and purchase agreement – Balance of purchase price not paid – Deposit forfeited – Whether purchaser has interest for which caveat can be lodged.

Land Law – Caveat – Who may lodge – Whether respondent entitled to obtain title or interest in land.

On May 10, 1984 the applicants entered into a sale and purchase agreement, wherein they agreed to sell their freehold land, together with a single storey detached house to the respondent for a consideration of $445,000. The respondent paid the initial deposit of $45,450 and the balance of the purchase price was to be settled not later